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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Gary Schaeffer, an individual Plaintiff, v. Chuck Anderson, an individual, Hearst Communications, Inc., and Campbell-Ewald Company. Defendants.	Civil Action No:

COMPLAINT

Plaintiff Gary Schaeffer (hereinafter "Plaintiff") through his attorneys, complaining of Defendants, Chuck Anderson, Hearst Communications, Inc., and Campbell-Ewald Company (collectively hereinafter "Defendants") alleges as follows:

INTRODUCTION

1. Plaintiff, through his attorneys, brings this action including copyright infringement, unfair competition in violation of state law, and common law unfair competition against Defendants. These causes of action arise from Defendants' continued and unlawful distribution of an advertisement in Food Network Magazine "A Year

of Cupcakes" issue consisting of the unlawful photographic use of a Japanese knockoff of the copyrighted XODIAC action figure sculpture ("XODIAC Figure") owned by Plaintiff. A copy of the Food Network Magazine's "A Year of Cupcakes" issue and infringing "Milk Life" advertisement is annexed hereto as **Exhibit "A"**. Such unlawful use violates Plaintiff's copyrights, misrepresents an association or sponsorship between Plaintiff and Defendants, and is in violation of unfair competition laws. Defendants have willfully continued to engaged in this copyright infringement, despite notice from Plaintiff in the form of a cease and desist letter informing Defendants of Plaintiff's copyrights.

2. Plaintiff seeks a preliminary and permanent injunction enjoining Defendants from further infringement of all copyrighted works of the Plaintiff as well as statutory damages and costs of litigation and reasonable attorney's fees.

PARTIES

3. Plaintiff Gary Schaeffer is an individual residing at 400 West 63rd Street, Apt 1401, New York, New York 10069. Plaintiff is a natural person and is a collector of sports and entertainment memorabilia, historical documents, autographs, photographs, souvenirs and other novelties.

4. Upon information and belief, Defendant Chuck Anderson ("Defendant Anderson") is an individual with an address of 124 North First Street, Minneapolis, MN 55401. Defendant Anderson is a natural person and is a professional artist and photographer in Minneapolis, Minnesota. He sells or licenses photographs to people and companies seeking to make use of the photographs for advertisements and pecuniary gain.

5. Upon information and belief, Defendant Hearst Communications, Inc. ("Defendant Hearst") is a Delaware corporation with its corporate office and principal place of business at 300 West 57th Street, New York, New York 10019. Defendant Hearst is in the business of creation and distribution of media, information and services via television and print.

6. Upon information and belief, Defendant Campbell-Ewald Company ("Defendant Campbell") is a Delaware corporation with an address and place of business at 386 Park Avenue South, 15th Floor, New York, New York 10016. Defendant Campbell is in the business of creating and distributing advertisement campaigns for companies.

NATURE OF ACTION

7. This action arises and is brought under the copyright laws of Title 17 of the United States Code, Sections 349 and 350 of the

New York General Business Law, and the unfair competition laws of the State of New York.

JURISDICTION

8. Jurisdiction is founded upon the United States Code, 28 U.S.C. § 1331 relating to the adjudication of a law of the United States, specifically, 17 U.S.C. § 501 and 28 U.S.C. § 1338(a).

9. Jurisdiction over the NY GBL §§ 349 and 350 and common law unfair competition claims is founded upon the United States Code, 28 U.S.C. § 1338(b).

10. Jurisdiction over the person of Defendant Anderson is vested in the United States District Court for the Federal Judicial District of New York, Southern District, by virtue of Defendant Anderson's acts of infringement asserted herein, occurred in the State of New York, and Defendant Anderson has caused injury to Plaintiff within the State of New York.

11. Jurisdiction over Defendant Hearst is vested in the United States District Court for the Federal Judicial District of New York, Southern District, by virtue of Defendant Hearst being a business entity with a specific presence within the State of New York, namely, a principal place of business and Defendant Hearst's

acts of infringement asserted herein occurred in the Statement of New York, specifically the manufacture, production, shipment, distribution and sale of the subject matter of this Complaint in this State.

12. Jurisdiction over Defendant Campbell is vested in the United States District Court for the Federal Judicial District of New York, Southern District, by virtue of Defendant Campbell being a business entity with a specific presence within the State of New York, namely, a place of business and Defendant Hearst's acts of infringement asserted herein occurred in the Statement of New York, specifically the creation, production, and sale of the subject matter of this Complaint in this State.

VENUE

13. Venue is properly laid in this Federal Judicial District of New York, Southern District, pursuant to 28 U.S.C. § 1391(b)(2because Defendants transact business within this district and this is the district in which a substantial part of the events or omissions giving rise to the claims set forth occurred.

FACTS COMMON TO ALL COUNTS

History of The Outer Space Man and Plaintiff's Activities

14. Since at least as early as 1971 Plaintiff has been buying, selling and collecting sports and entertainment memorabilia, historical documents, autographs, photographs, souvenirs and other

novelties, including being the owner of sixteen (16) original negative photographs of the world famous rock and roll singing group, The Beatles, taken by the famed photograph Albert Marrion since January 25, 2001. Plaintiff is also the joint owner to The Outer Space Men, LLC which includes famous space action figure characters from as early as 1968.

15. The Outer Space Men are a group of sculpted, bendable action figures originally produced by the Colorforms Company in 1968, under a license from Mel Birnkrant, a toy inventor who independently authored and created each of the toy action figures in 1967. Each fictional character represents an extraterrestrial being from the planets in our Solar System, as well as various places in our galaxy.

16. Figures in the original series include:

a. Alpha 7, the Man from Mars: A diminutive alien molded in lime green with green skin, a bald, green head with antennae and a metallic blue space suit with a green-tinted (removable) helmet.

b. Astro-Nautilus, the Man from Neptune: alien molded in purple with a Chamber of Nautilus head and an octopus armed body, four poseable tentacles and a metallic gold space suit.

c. Commander Comet, the Man from Venus: The most human-looking alien, molded in pink with large, (removable) angelic wings, a pink-tinted, (removable) helmet, and a metallic gold space suit.

d. Colossus Rex, the Man from Jupiter: The largest and fiercest-looking alien, molded in lime green and resembling The Creature from the Black Lagoon, wearing only dark purple shorts over a huge, muscular body.

e. Electron+, the Man from Pluto: A bald, robotic-looking alien molded in gray, entirely painted silver with a clear, (removable) space helmet.

f. Orbitron, the Man from Uranus: The tallest alien, molded in pink with the least amount of paint, is an alien with a large exposed brain, a beak-like mouth, long, gangly limbs and pincers in place of hands.

g. **Xodiac**, the Man from Saturn: molded in deep red, with a red bald head, pointed ears and chin, a blue metallic space suit with a (removable) pink-tinted helmet and "Saturn" emblem on chest. A copy of the XODIAC Figure is annexed hereto as **Exhibit "B"**.

17. Each of The Outer Space Men characters was armed with some type of weapon, and several also included a helmet or other

accessory (the accessories/weapons are constructed of hard-cast polystyrene of various colors).

18. On December 4, 1968, Colorforms registered a copyright for the XODIAC Figure, Copyright Reg. No. GP0000063478 ("XODIAC Copyright"). A copy of the record located on the Copyright Office's website is annexed hereto as **Exhibit "C"**.

19. In 2005, creator Mel Birnkrant partnered with Gary Schaeffer to form a company called The Outer Space Men, LLC, which has revived THE OUTER SPACE MEN brand with the release of a graphic novel, and a number of related products, including a new series of toy action figures.

20. Since at least as early as 2005, Plaintiffs have sold in the United States toy action figures and related items under the series name The Outer Space Men, and including the individual name and trademark XODIAC.

21. On March 6, 2009 the XODIAC Copyright was assigned from the defunct Colorforms to Mel Birnkrant and Plaintiff, Gary Schaeffer, as joint owners, recorded in Volume 3575 Doc. No. 508 with the United States Copyright Office. The renewal for the XODIAC Copyright was recorded on March 6, 2009 RE 930-653, which displayed

Plaintiff, Gary Schaeffer as a joint owner of the XODIAC Copyright. A copy of the assignment and renewal recordation is annexed hereto as **Exhibit "D"**.

22. Plaintiff has successfully and exclusively profited from the sale of the XODIAC Figure since at least as early as 2005. The Outer Space Men toy action figures, including the XODIAC Figure have been marketed, advertised, and displayed by Plaintiff on the internet via theouterspacemen.com website, on eBay and have been featured in trade shows. Since at least as early as 2005, Plaintiff has spent considerable sums in promoting The Outer Space Men toy action figures, including the XODIAC Figure.

Defendants' Activities

23. On or around January of 2017, Plaintiff reviewed a recent issue of Food Network Magazine's "A Year of Cupcakes" issue. Inside the issue, there was an advertisement for "Milk Life" containing an unauthorized image of a Japanese knockoff of the XODIAC Figure (as shown in Exhibit A). The Japanese knockoff is substantially similar to the XODIAC Figure as it has the same shape, clothing design (i.e., the ribbed shoulder, elbow, thigh, and knee pads), center circular logo in the middle of the figure's chest, same helmet shape, and the same facial characteristics (i.e., the head shape, ears, beard design, and eyes)("Japanese Knockoff"). A side-

by-side comparison of the XODIAC Figure and Japanese Knockoff is annexed hereto as **Exhibit "E"**.

24. Upon information and belief, the "Milk Life" advertisement was originally created by Defendant Anderson and was commissioned by Defendant Campbell for one of Defendant Campbell's clients. Defendant Hearst sold advertising space to Defendant Campbell for the "Milk Life" advertisement to display in issues of one of Defendant Hearst's publications, Food Network Magazine.

25. On January 31, 2017, Plaintiff's counsel sent a cease and desist letter to Vicki Wellington, VP/Publisher/CRO of Hearst Communications Inc. demanding that it: (i) immediately cease and desist all sales of the Food Network Magazine "A Year of Cupcakes" issue and any future advertisements including the unauthorized image of the XODIAC Figure; (ii) immediately notify Plaintiff that Defendant Hearst will in no way make further unauthorized use of the XODIAC Copyright; (iii) pay for a release license authorizing the prior use the XODIAC Figure in the amount of $50,000; and (iv) provide an accounting of any sales or distribution of the Food Network Magazine "A Year of Cupcakes" Issue. A copy of the Plaintiff's letter addressed to Defendant Hearst dated January 31, 2017 is annexed hereto as **Exhibit "F"**.

26. On February 10, 2017, Jennifer D. Bishop, Esq. from Defendant Hearst responded to Plaintiff's cease and desist letter. Ms. Bishop indicated that the "Milk Life" advertisement in question was not created by Defendant Hearst but was placed by Defendant Campbell and would forward Plaintiff's January 31, 2017 cease and desist letter to Defendant Campbell. A copy of Defendant Hearst's February 10, 2017 cease and desist response letter is annexed hereto as **Exhibit "G"**.

27. On or around February 21, 2017, Stephen Zeff, Esq. contacted Plaintiff's counsel by telephone indicating that he represented Defendant Campbell and received Plaintiff's January 31, 2017 cease and desist letter. Mr. Zeff further indicated that Defendant Campbell is the advertising agency that created and placed the print "Milk Life" advertisement appearing in Food Network Magazine.

28. On or around February 2017, Plaintiff noticed that the infringing "Milk Life" advertisement was printed again in a recent edition of the Food Network Magazine the Italian Issue. A copy of the Food Network Magazine, the Italian Issue is annexed hereto as **Exhibit "H"**.

29. On or around February 22, 2017, Mr. Zeff and Plaintiff's counsel communicated via telephone again and Mr. Zeff indicated that he would forward Plaintiff's January 31, 2017 cease and desist letter to Defendant Anderson's counsel.

30. On February 22, 2017, Plaintiff's counsel emailed Mr. Zeff notifying him that Food Network Magazine ran the identical infringing "Milk Life" Advertisement in its Italian Issue. A copy of the email correspondence between Mr. Zeff and Plaintiff's counsel is annexed hereto as **Exhibit "I"**.

31. On March 2, 2017, John Pickerill, Esq. representing Defendant Anderson, sent a letter to Plaintiff's counsel erroneously disputing Plaintiff's claims to the XODIAC Copyright and included baseless threats of legal action against Plaintiff's counsel for bad faith and unethical conduct. A copy of Mr. Pickerill's response letter is annexed hereto as **Exhibit "J"**.

32. On March 22, 2017, Plaintiff's counsel responded to Mr. Pickerill's March 2, 2017 letter and provided detailed information as to Plaintiff's rights to the XODIAC Copyright and demanded that Defendant Anderson: (i) immediately cease and desist any use of the unauthorized image of the Japanese Knockoff of the XODIAC Figure, including notifying any magazine publications to stop

running the infringing "Milk Life" advertisement; (ii)immediately inform Plaintiff that he will in no way make further unauthorized use of the XODIAC Figure or Copyright or continue use of the Japanese Knockoff; and (iii) pay for a release license authorizing the prior use of Plaintiff's XODIAC Figure and Copyright in the amount of $100,000 for the willfulness of Defendants to continue print of the infringing "Milk Life" advertisement. A copy of Plaintiff's March 22, 2017 response letter is annexed hereto as **Exhibit "K"**.

33. Defendants have damaged the business and goodwill of Plaintiff nationally, and in this judicial district, and unless enjoined, Plaintiff is informed and believe that Defendants will continue such conduct to the immediate and impending, irreparable injury of Plaintiff.

COUNT 1
COPYRIGHT INFRINGEMENT
(17 U.S.C. § 501)
All Defendants

34. Plaintiff repeats the re-alleges paragraphs 1 through 33 above as if set forth specifically herein.

35. The XODIAC Copyright consists of copyrightable subject matter under the Copyright laws of the United States, 17 U.S.C. 101 et seq.

36. Plaintiff has duly complied with the provisions of the Copyright Laws of the United States. He has secured the exclusive rights and privileges as joint owner (as demonstrated in March 6, 2009 assignment referenced above in Exhibit D), in and to the XODIAC Copyright and has received from the Register of Copyrights, the Renewal Registration Certificate No. RE 930-653, pertaining to original XODIAC Figure, Copyright Reg. No. GP0000063478 (referenced above as Exhibit C and D).

37. On or Around January 2017, Plaintiff discovered the infringing "Milk Life" advertisement in the Food Network "A Year of Cupcakes" issue (reference above as Exhibit A). Plaintiff did not consent to, authorize, permit, or allow in any manner Defendants use an image of the Japanese Knockoff of Plaintiff's unique and original materials and/or work XODIAC Figure in the "Milk Life" advertisement as depicted in the Food Network Magazine "A Year of Cupcakes".

38. Plaintiff is informed and believes and thereon alleges that Defendants breached Title 17 of the United States Code in that it published, communicated, benefited through, posted, publicized, and otherwise held out to the public for commercial benefit, and image of the Japanese Knockoff of Plaintiff's XODIAC Figure without Plaintiff's consent or authorization and

acquired monetary gain and market benefit as a result.

39. Defendants have willfully continued to infringe on Plaintiff's XODIAC Copyright by running the infringing "Milk Life" advertisement in the recent Food Network Magazine the Italian Issue despite receiving prior notice on January 31, 2017 from Plaintiff regarding the infringing "Milk Life" advertisement.

40. Plaintiff has no adequate remedy at law and has suffered and is continuing to suffer irreparable harm and damage as a result of the aforementioned infringing acts of Defendants alleged herein.

41. The Defendants' acts and omissions are in violation of Title 17 U.S.C. §§ 101 *et. seq.*, in that the same constitute substantial, unauthorized, and willful copying of the XODIAC Copyright. As a result of each and every of Defendants' violations of Title 17 of the U.S. Code, Plaintiff is entitled to any actual damages pursuant to 17 U.S.C. § 504(b) or statutory damages in an amount up to $150,000.00 since such conduct was willful pursuant to 17 U.S.C. § 504.

42. As a result of the Defendants' violations of Title 17 of the U.S. Code, the Court in its discretion may allow the recovery of full costs as well as reasonable attorney's fees and costs pursuant to 17 U.S.C. § 505 from Defendants.

COUNT 2
UNLAWFUL DECEPTIVE ACTS AND PRACTICES IN VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 349
(NY GBL § 349)
All Defendants

43. Plaintiff repeats the re-alleges paragraphs 1 through 42 above as if set forth specifically herein.

44. The Defendants' foregoing acts are likely to cause and are causing confusion, mistake, and deception among the general public. Such acts are also likely to deceive the public into believing that the goods (i.e., the Japanese Knockoff) photographed in the "Milk Life" advertisement by the Defendants originate from, are associated with, or as otherwise authorized by Plaintiff.

45. The Plaintiff has suffered, and will continue to suffer, irreparable harm as a result of the Defendants' actions, unless the Defendants are enjoined from engaging in the unlawful deceptive acts and practices.

46. As a direct and foreseeable result of Defendants' conduct, the Plaintiff has been injured and have suffered damages, in an amount to be determined at trial, but in no event less than $1,000,000, and are entitled to three times the profits the Defendants have obtained from its wrongful acts and/or attorneys' fees, whichever is greater, as will be proven at trial.

COUNT 3

FALSE ADVERTISING IN VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 350

(NY GBL § 350)

Defendants Anderson and Campbell

47. Plaintiff repeats the re-alleges paragraphs 1 through 46 above as if set forth specifically herein.

48. Defendant Anderson's and Defendant Campbell's foregoing acts misrepresent to the general public that the goods (i.e., the Japanese Knockoff) photographed in the "Milk Life" advertisement by Defendant Anderson and Defendant Campbell originate from, are associated with, or as otherwise authorized by Plaintiff.

49. The Plaintiff has suffered, and will continue to suffer, irreparable harm as a result of Defendant Anderson's and Defendant Campbell's actions, unless the Defendants are enjoined from engaging in the unlawful false advertising practices.

50. As a direct and foreseeable result of Defendant Anderson's and Defendant Campbell's conduct, the Plaintiff has been injured and have suffered damages, in an amount to be determined at trial, but in no event less than $1,000,000, and are entitled to three times the profits the Defendants have obtained from its wrongful acts and/or attorneys' fees, whichever is greater, as will be proven at trial.

COUNT 4
UNFAIR COMPETITION UNDER NEW YORK STATE COMMON LAW
All Defendants

51. Plaintiff repeats the re-alleges paragraphs 1 through 50 above as if set forth specifically herein.

52. Plaintiff has built up valuable goodwill in his XODIAC Copyright and Figure.

53. Through the acts described above, the Defendants have willfully, knowingly and/or recklessly engaged in unfair acts or practices and unfair methods of competition, including the unauthorized photographic usage of a Japanese Knockoff of the Plaintiff's XODIAC Copyright and goodwill.

54. These continuing practice are anti-competitive, commercially immoral, and unethical and have caused and threaten to cause substantial additional injury to Plaintiff. As a result of such violations, the Defendants have gained and will continue to gain unjust profits and undeserved goodwill.

55. The Defendants knew, or should have known, that XODIAC Copyright is a registered copyright jointly owned by Plaintiff.

56. The repetitive and continuous sale by Defendants of the "Milk Life" advertisement displaying the Japanese Knockoff has misled and will continue to mislead the public into assuming a connection between the Plaintiff and Defendants.

57. The acts of Defendants have been and continue to be in conscious and deliberate disregard of Plaintiff's rights.

58. Plaintiff has suffered and continue to suffer irreparable harm as a result of the Defendants'' actions. The Plaintiff will continue to be harmed unless the Defendant is enjoined from engaging in unfair competition.

59. As a direct and foreseeable result of Defendants' conduct, the Plaintiff has been injured and has suffered damages in an amount to be determined at trial, but in no event less than $1,000,000, and are entitled to three times the profits the Defendants have obtained from its wrongful acts and/or attorneys' fees, whichever is greater, as will be proven at trial.

WHEREFORE, Plaintiff prays for relief as follows:

A. A judgment that Defendants, their directors, officers, agents, employees, related companies, parent companies, subsidiaries, licensees, assigns, and all parties in privity with them, be preliminarily and permanently enjoined from using Plaintiff's XODIAC Copyright and Figure, which usage infringes on the copyright jointly owned by Plaintiff, in any manner including but not limited to, manufacturing, printing, reproducing, reprinting, publishing, vending, publicly distributing, selling, displaying, promoting, or advertising on the internet or elsewhere, any infringing copies or knockoffs thereof, or any other copies of the copyrighted works, or by causing and/or participating in such manufacturing, printing, reprinting, publishing, vending, distributing, displaying, selling, promoting, or advertising pursuant to 17 U.S.C. § 502(a);

B. A Judgment that Defendants be required to deliver up to the Court to be impounded during the pendency of this action, all infringing copies containing the XODIAC Copyright in their possession or control; On Count 2, based upon Misrepresentation, False Designation of Origin and Unfair Competition in violation of 15 USC § 1125(a), enjoining the Defendant from engaging in misrepresentation, false designation of origin and unfair competition, and damages in an amount to be determined at trial, but in no event less than $1,000,000;

C. A Judgment that Defendants file with this Court and serve upon Plaintiff within thirty (30) days after service of the injunction demanded above, a report, in writing, under oath, setting forth in detail the manner and form in which it has complied with the injunction;

D. A Judgment that Defendants be preliminarily and permanently enjoined from assisting, aiding or abetting any other person or business entity in engaging in or performing any of the activities enumerated in paragraph A pursuant to 17 U.S.C. § 502(a);

E. A Judgment that Defendants be required to account pursuant to 17 U.S.C. § 504 for Defendants' profits derived from advertising, promoting, marketing, purchasing, distributing, displaying, selling, offering to sell the "Milk Life" advertising depicting the Japanese Knockoff of the XODIAC Copyright;

F. A judgment awarding Plaintiff statutory damages by Defendants for willful copyright infringement in an amount not less than $150,000 pursuant to 17 U.S.C. § 504(c);

G. A judgment awarding Plaintiff the full costs of litigation and reasonable attorney's fees pursuant to 17 U.S.C. § 505; and

H. For such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY

A trial by jury is hereby demanded on all issues so triable.

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DATED: April 4, 2017
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